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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 356

JAMES W. ANDREWS, as Trustee in Bankruptcy of the Estate of Frank Shannon, Bankrupt,

Petitioner,

against

THE METROPOLITAN JOCKEY CLUB and WALTER KEENAN and CENTRAL HANOVER BANK AND TRUST COMPANY, Sole Executors of the Estate of John G. Cavanagh, deceased,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH S. AUERBACH,
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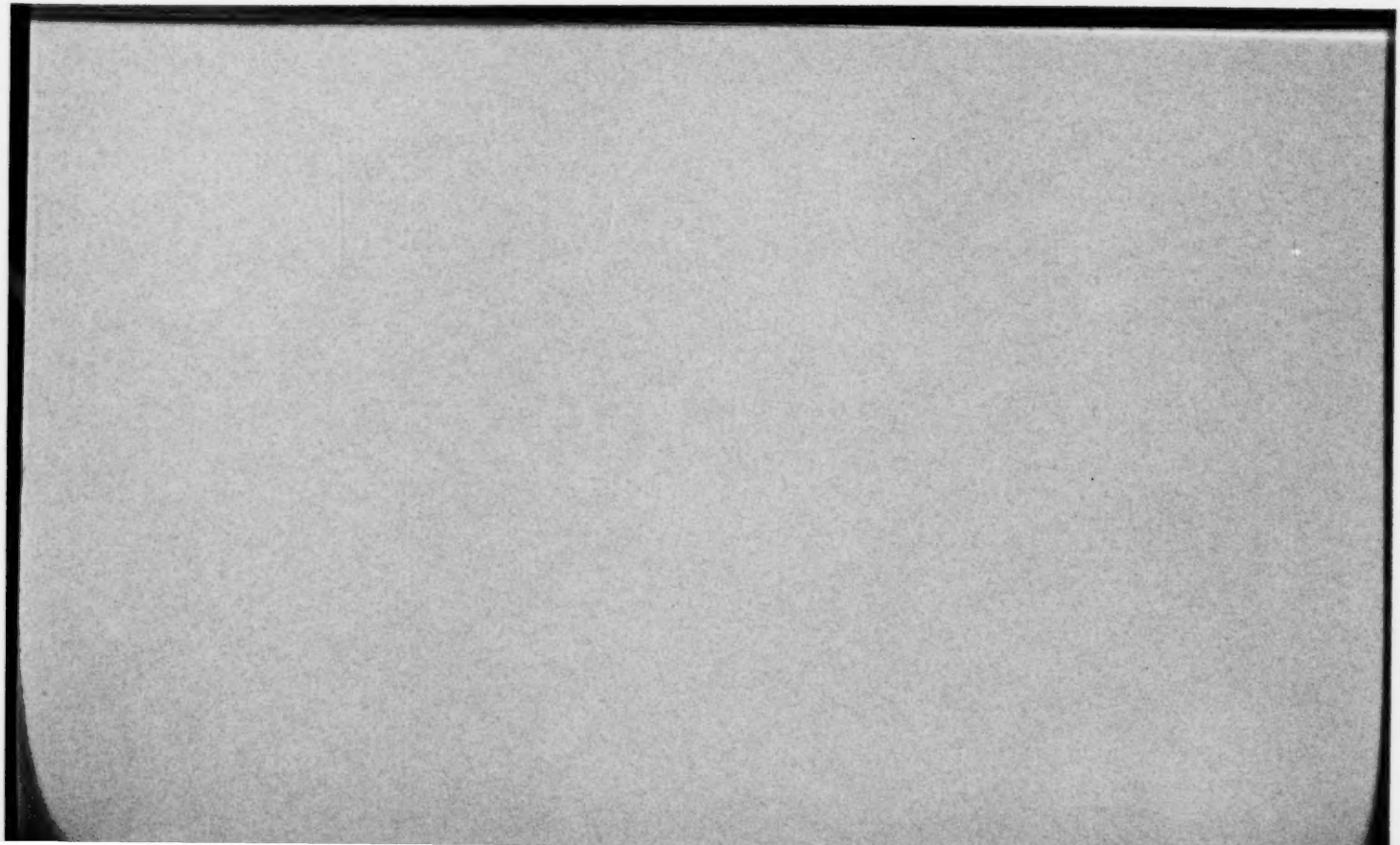

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The petition is for a writ of certiorari. The New York Court of Appeals unanimously affirmed, without opinion, a judgment of the Appellate Division of the Second Department which, in turn unanimously affirmed, without opinion, a judgment of the Supreme Court dismissing plaintiff's complaint after a trial.

Statement

Plaintiff, as Trustee in Bankruptcy of Frank Shannon, sued for money had and received, alleging that between the 1st of April, 1932 and the 1st of December, 1936, in the State of New York, the defendants became indebted to Frank Shannon in the amount of $13,500 for money had

and received by the defendants to the use of Frank Shannon (p. 7, fol. 21).

The complaint was dismissed after a trial before the Court without a jury, in the Supreme Court of Nassau County, Mr. Justice Hooley writing an opinion which is printed at page 252 of the Court of Appeals record. He held:

> "The proof clearly indicates that the moneys used by Shannon through the years 1934, 1935 and 1936, were not his own moneys but rather were moneys belonging to individuals who 'bank-rolled' him. 'Bank-rolling', in racing circles, appears to be a method whereby a bookmaker is financed by some individual who pays the bookmaker a per diem salary and pays all his expenses." (p. 253, fols. 758, 759)

The Court further stated:

> "These funds were not the property of Shannon. He was merely an agent with respect of these payments. The moneys which are the subject of this suit never at any time belonged to the bankrupt. This bars recovery by the trustee herein." (p. 254, fol. 760)

The plaintiff contended that evidence as to the actual ownership of the moneys was erroneously received because the transactions under which the defendant Jockey Club had received moneys through Shannon involved gambling. He urged in turn that the transactions were illegal because Chapter 233 of the Laws of 1934, and Chapter 696 of the Laws of 1937, amending the Penal Law and regulating betting at race tracks, were unconstitutional and void in that such State statutes did not properly carry out the mandate of the State Constitution in regard to betting (Bill of particulars pages 11, 12). Thus, plaintiff argued, the Penal Law, unamended, applied to the transactions, stamped them with illegality, and allowed the creditors of Shannon to recover the moneys on a false presumption that they belonged to Shannon, at the same time precluding defendants from proving that actually, they did not belong to Shannon.

The trial Court refused to allow this argument to preclude proof of the ownership of the moneys, and thus found it unnecessary to decide the so-called "constitutional" question as to whether a State statute properly applied the State Constitution, saying:

> "It would be a miscarriage of justice to allow creditors of a bankrupt to recover money never owned by that bankrupt through a technical claim that evidence may not be presented to show that he did not own the money because he used it in connection with an illegal business, viz.: bookmaking. The claim of illegality should not be permitted as a cloak for injustice." (p. 254, fols. 761, 762)

The Court concluded:

> "The finding by the court that the moneys in question did not belong to Shannon at the time of the payments to the defendant make it unnecessary to pass upon the very interesting questions, constitutional and otherwise, involved herein." (p. 255, fols. 763, 764)

The Appellate Division unanimously affirmed the dismissal of the complaint. The Court of Appeals, after granting permission to appeal to it, has also unanmiously affirmed the dismissal.

Summary of Argument

1. The complaint was dismissed on a purely factual determination that the moneys sought to be recovered by the Trustee in Bankruptcy were not assets of the bankrupt estate. No Federal question was involved in such determination, and no Federal question has heretofore been suggested.

2. This Court has no jurisdiction over the suggested national policy in respect of gambling, and no such question is presented on the record.

POINT I

The petition should be denied, because no Federal question was involved in the dismissal of the complaint, or in the decision below. The factual determination is sufficient to sustain the dismissal.

There is no assertion or claim made in the petition that there has been drawn in question in this case the validity of a statute of the State of New York on the ground of its being repugnant to the Federal Constitution or to the Laws of the United States, nor is there any contention or claim made that any right, title, privilege or immunity was specially set up or claimed by either party under the United States Constitution or under any Statute of the United States.

The determination of the factual dispute as to the true ownership of the moneys involved no Federal question. In respect of the admissibility of evidence on the subject, purely State rules, statutes and decisions were urged. Such questions of evidence present no Federal question.

> *West* v. *Louisiana,* 194 U. S. 258;
> *Bell Telephone Company of Pennsylvania* v. *Pennsylvania Public Utility Commission,* 309 U. S. 30.

The attempt of plaintiff to inject a State constitutional question into the argument in respect of admissibility of evidence did not, in the faintest degree, involve Federal statute or constitution or impairment of plaintiff's rights thereunder. The State statute regulating betting, attempted to be attacked by the trustee in bankruptcy, was of the same character as the Percy-Gray Law (Laws of 1895, Chapter 570), the constitutionality of which had been upheld in *People ex rel. Sturgis* v. *Fallon,* 152 N. Y. 1. The plaintiff,

trustee in bankruptcy, was not affected by the statute, and was in no position to question its constitutionality.

People v. *Sanger*, 222 N. Y. 192;
Liberty Warehouse Co. v. *Burley Tobacco Growers', etc.*, 276 U. S. 71.

The trial Court's decision that its findings as to ownership of the money made it unnecessary to pass upon such question is not, after affirmance by the highest Court, reviewable here.

No Federal question has been pleaded in complaint or bill of particulars. None was raised on the trial or argued in the Court of Appeals. In fact, on plaintiff's application to the Court of Appeals for a reargument, he stated at page 9 that the absence of an opinion by the Court of Appeals rendered it difficult, "if not almost impossible" to comply with the rules of this Court in petitioning for a writ of certiorari, and stated:

> "The Appellant here has been denied a proper record on which to petition the United States Supreme Court for a writ of certiorari in this case."

When petitioner at page 2 of his petition herein states, "The facts are not in dispute", he seemingly concedes that the moneys, in reality, never were assets of his bankrupt's estate.

The finding of fact, determinative of the case, is binding on this Court and is not reviewable here.

Interstate Amusement Co. v. *Albert*, 239 U. S. 560;
Water-Pierce Oil Co. v. *Texas*, 212 U. S. 86;
Chrisman v. *Miller*, 197 U. S. 313.

POINT II

The petition should be denied, because this Court has no jurisdiction over the matters urged therein.

The petitioner suggests as a guiding principle that the gambling industry should bear the economic burden of absorbing the losses incident to its operations, and that this is a matter of wide governmental interest; that it is important that there be a national policy in respect to it; and in respect of such suggested national policy that this is a Court of final jurisdiction. The petitioner does not, in his assignments of error at page 12 of his petition, assert any error involving a Federal question or any question which may properly be reviewed by this Court. The matters of national policy urged by him were not involved in the dismissal of his complaint.

Respectfully submitted,

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